No. 4354.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PASCO BAKOTICH,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Brief of Defendant in Error

Upon Writ of Error to the District Court of the United States for the District of Oregon.

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For Defendant in Error.

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STATEMENT.

On the 21st day of November, 1923, an information was filed in the United States District Court for the District of Oregon, charging Pasco Bakotich with violation of Sections 3 and 21, of Title II, of the National Prohibition Act. The information contained three counts, Count One charging possession of a quantity of moonshine whiskey; Count Two charging him with sale of moonshine whiskey; and Count three charging him with maintaining a nuisance at 83 7th Street, in the City of Astoria, Oregon. On the 20th day of February, 1924, after trial by jury, said defendant was found guilty of all three counts.

Defendant has sued out a writ of error and has alleged, in support thereof, in his assignments of error that the Court erred in its refusal to give certain instructions requested by the defendant, pertaining to entrapment, set forth in the Transcript of Record on Pages 17 and 19, which instructions are as follows:

> "The Court instructs the jury that in cases where criminal intent originates in the mind of the defendant, the fact that officers, either of the Government or of the state used decoys

or untruthful statements to furnish opportunity for or to aid the accused in the commission of a crime in order successfully to prosecute him therefor, that these acts of the officers are no defense, but, on the other hand, if the accused never conceived any intention of committing the offense, the fact that officers of the Government or of the city incited and by persuasion and misrepresentation induced him to commit the offense charged, in order to entrap, arrest and prosecute him therefor, I instruct you that this is fatal to the prosecution and the accused is entitled to a verdict of not guilty in relation to the sale of the said intoxicating liquor to the witness McGee." Defendant's Requested Instruction No. I.

"The Court instructs the jury that where the criminal intent originates in the mind of the entrapped person, and the accused is lured into the commission of the offense charged, in order to prosecute him therefor, it is the general rule that no conviction may be had though the criminality of the act is not affected by any question of consent, therefore if

> you find from the evidence in this case that the officer McGhee or any officer of the State of Oregon or of the city of Astoria lured or induced the defendant Pasco Bakotich to commit the offense charged in order to prosecute him therefor, then I instruct you that your verdict should be not guilty." Defendant's Requested Instruction No. II.;

and on the further grounds that the Court erred in its instructions to the jury with reference to the right in an officer to approach a person suspected of violating the law for the purpose of giving him an opportunity to sell him intoxicating liquor and comparing said conduct on the part of said officer with the placing of decoy letters in the United States mail for the purpose of catching persons suspected of transgressing the laws regulating the mails, which instruction is set forth on pages 37 and 38 of the Transcript of Record and is as follows:

> "Something has been said here about a decoy, or about the act of McGhee acting as a decoy, in order to induce this defendant to commit the offense with which he is charged here. A person, and a officer, has a perfect right, for the purpose of determining whether

crimes have been committed, to, as in this case, approach the person who is suspected and propose to purchase liquor of him. That is done every day. It is done with reference to the postoffice departments. An officer who is carrying the mails, for instance, is suspected of taking money in it, and at the end of the route it is found that the letter has been opened and the money taken out. The fact of putting the decoy letter in the mail is for the purpose of obtaining information as to whether the person suspected is transgressing the law. So, in this case, McGhee had a perfect right to go to this defendant and propose to buy liquor of him, for the purpose of determining and ascertaining whether or not the defendant was engaged in the business of selling liquor; and that is about all there is to that."

Defendant contends that as to the sale charged in the information and from the evidence adduced at the trial to prove said sale, he was entitled to have an instruction on the question of entrapment, and on that theory requested the instructions hereinbefore referred to, which the Trial Court re-

fused to give. No question is raised as to the sufficiency of the evidence to support the verdict of the jury. Nor is it contended that any error was committed by the Court in its instructions with reference to the evidence concerning the charge of possession of liquor or concerning the charge of maintaining a nuisance in violation of the National Prohibition Act.

There was testimony of other violation of the liquor laws by Bakotich introduced at the trial, which was allowed to go to the jury in support of the third count of the information, which evidence has not been set forth in this record, and which evidence was commented upon by the Court in his instructions on pages 36 and 37 of the transcript of record.

As to the possession, it was not controverted that the liquor found in the possession of the defendant was illegally possessed and there is nothing to disturb the verdict of the jury on that count of the information, since there has been no claim made that the Defendant was entrapped into the possession of the liquor which he possessed.

Bakotich was adjudged to pay a fine of $250, and sentenced to a term of nine months in the County Jail of Multnomah County, Oregon, no specific

penalty being given to any particular count in the information.

POINTS AND AUTHORITIES.

Requested instructions may be properly refused if there are no facts in the case to justify such instructions.

Coffin vs. U. S., 162 U. S. 664, 672.

Bird vs. U. S., 187 Fed. 118, 132.

Brown vs. U. S., 142 Fed. 1;' 73 CCA 187.

The refusal to give an instruction is not error where the omission to give said instruction is favorable to the defendant.

State vs. Cook, 117 La. 14; 41 S. 434.

Instructions may be properly refused if fully covered by the general charge of the Court.

Coffin vs. U. S., supra.

Hendrey vs. U. S., 23 Fed. 5, 18.

Acquittal on a charge of selling liquor is not inconsistent with conviction for maintaining a common nuisance by keeping a place where liquor was unlawfully kept for sale.

Panzich, et al. vs. U. S., 285 Fed. 871.

Bilboa vs. U. S., 287 Fed. 125.

Scribner vs. U. S., 2 Fed. (2d) 144.

ARGUMENT.

The testimony of Earl McGhee, a police officer of the City of Astoria, discloses that said officer went to the soft drink saloon of Pasco Bakotich, which is located at 83 7th Street, Astoria, Oregon, on the 14th day of September, 1923, and while there purchased intoxicating liquor from Bakotich, for which he paid Bakotich fifty cents. After the sale was consummated, Bakotich was placed under arrest. The officer testified pertaining to the sale, in part as follows:

"Q. When did you first see Pasco Bakotich, the defendant in this case, Mr. McGhee?

A. Why, it was probably a couple of days before I made the purchase.

Q. A couple of days before what time?

A. The 14th of September.

Q. The 14th of September, 1923?

A. Yes.

Q. Where did you see him?

A. He was behind the **bar.**

Q. In what place?

A. In this same place.

Q. Describe this place.

A. It is 83 7th Street—I think is the number—City of Astoria.

Q. What county?

A. Clatsop County.

Q. What was he doing when you saw him as you remember, a few days before the 14th day of September, 1923?

A. Well, he was attending the duties ordinarily of a bartender in a place of that kind.

Q. What kind of a place is this 83 7th Street?

A. Well, what I know of the place it was a kind of a soft drinks, cigars, tobacco; also — —

Q. Well, we will come to the other business being conducted there. It is ostensibly then a soft drink place where soft drinks and cigars are being sold?

A. That is what it is generally known to be.

Q. And Pasco Bakotich on that date—that would be the 12th of September—was behind the bar when you first saw him?

A. Yes, sir.

Q. Since that time have you seen him in that place?

A. On September 14th.

Q. Now just tell the jury, Mr. McGhee, when you saw him on that date and where.

A. It was 11:15 in the morning September 14th, when I entered the place and ordered a drink of whiskey.

Q. From this defendant?

A. From Mr. Bakotich.

Q. All right. Just tell the jury what took place.

A. Well he served the drink. I tendered him the cash money for it.

Q. How much did you pay him?

A. I handed him a five-dollar bill.

Q. Yes.

A. And he rang it up in the cash register and gave me four fifty change. My drink was sitting on the bar.

Q. You may state, Mr. McGhee, where he secured the drink that he served to you.

A. Well, he had it in a container just under the top of the bar. He reached under the bar. I didn't see the transaction. I didn't see what he filled the glass out of. I didn't see the container. But he brought the glass out, set it on the bar in front of me."

The above evidence of Officer McGhee pertaining

to the sale of liquor disclosed that the officer went into this "soft drink parlor," ordered a drink of whiskey as a person would order a cigar and, without any hesitancy on the part of Bakotich, was served with a glass of moonshine whiskey for which he paid Bakotich fifty cents. The officer did no more, according to the theory of the Government's case and according to the testimony of the officer, than give the defendant an opportunity to commit a crime. The liquor was sold to the officer, according to his testimony, upon his bare request for a drink of whiskey. Bakotich's promptness in selling him the liquor corroborated the testimony of the other officers as to the reputation of this ostensible soft drink saloon commented upon in the instructions of the Trial Court on pages 36 and 37 as follows:

> "Now there has been testimony admitted here, Gentlemen of the Jury, tending in some way to show that the defendant had, prior to this time, either been dealing with intoxicants, or had them about his premises, or was exhibiting acts which would tend in some measure to show that he was engaged in the business of dispensing intoxicating liquor. I refer to the testimony of the Chief of Police and the

other officer who testified here. This testimony is not permitted to go to you for the purpose of proving the sale that was made on that date of September 14th; but it is admitted for the purpose of showing, if it has that effect, whether or not the defendant was maintaining and keeping a common nuisance."

The instruction of the Court with reference to the conduct of McGhee, to which the Defendant has taken exception, was a proper instruction and correctly stated the law and theory of the Government's case.

The only question to be considered on review is (first) whether, in view of the record the Defendant was entitled to the instructions in the form requested, and (second) whether or not he was entitled to any instructions whatsoever upon entrapment.

The instruction designated by counsel as Instruction I, which he requested and which is hereinbefore set forth, was not proper in form and was rightly refused by the Court. I refer particularly to that part of said instruction as follows:

> "If the accused never conceived any intention of committing the offense, **the fact** that officers of the Government or of the state incited and by persuasion and misrepresentation induced him to commit the offense charged in order to entrap, arrest and prosecute him therefor, I instruct you that this is fatal to the prosecution and the accused is entitled to a verdict of not guilty in relation to the sale of the said intoxicating liquor to the witness McGhee."

This instruction assumes that the officers did incite, and by persuasion and misrepresentation induce said defendant to commit the offense charged in order to entrap, arrest and prosecute him therefor, instead of leaving the question to the jury as to whether or not that was done.

As to the second instruction, it appears that in a proper case, a defendant would be entitled to have said instruction given. In this case, however, the Court did not commit any error in refusing to give either of the instructions requested by the defendant. The requested instructions were not supported by the evidence or theory of the defense of Pasco Bakotich. He has not contended that he was en-

trapped or ensnared into the commission of any crime whatsoever. In fact, he denied that he had sold any liquor to the officer McGhee, but contended that he had given the liquor to McGhee because McGhee represented to him that he was sick. I refer to his testimony, which is in part as follows:

"Q. You heard McGhee testify. Just tell the jury —talk to them so they can hear you—how you saw McGhee, how long you have know McGhee, all about that incident.

A. Well, McGhee, beginning when he come in the place?

Q. Yes.

A. There was another friend of mine, kind of old man, working in logging camp, I was playing a game of pitch with him for cigar, and beat him two games. And McGhee come in alongside this man, and asked me for a drink. I say, 'What kind of drink do you want? What do you mean drink?' I say, 'What do you mean, drink? Soda water, water, or what do you want?' He looks kind of sick to me, pale in the face. 'Why,' he says, 'Come on, Paul, give me a drink.' I asked him, I says, 'McGhee, this is two or three times this week

you have come in to this place. I don't know what you mean. Now, you better look out, don't come back, because you know very well we don't sell that stuff in this place. I never yet did sell one man, and I don't handle that stuff.' He says, 'Paul, please give me a drink, because I am sick'; and you know so many times he is sick, and sick, and put his hand like this (illustrating). 'Paul, please give me a drink.' I say, 'McGhee, I ain't got any. Get off me.' I thought maybe he was drunk. I thought maybe I would give him fifty cents to go ahead, look for drink. 'Well, you don't know what happened to me last night.'

Q. Who said that?

A. McGhee. He says, 'You don't know what happened to me last night.' I says, 'I don't know—fight?' 'No,' he says, 'I went down on Astor Street, on some joint, and,' he said, 'I had about three hundred some odd dollars, just come from the camp. I am clean broke.' So, to tell you the truth, I had a bottle a little bigger than this one, in my possession.

Q. What did you do?

A. Then I took out from my pocket, I seen him

so sick, I thought to save his life. I know what sickness is. And I poured it out in glass. I said, 'Go ahead, McGhee.' Then he come out, went in his pocket. He says, 'Paul, I want you this, because, **I know, of course, your money.'** I say, 'No. **That don't cost me money at all. I didn't buy that.** There is friend of mine gave it to me. I gave you that for sickness, not for selling it to you. So if you want help go ahead. **Take your money back, I don't want your money.' And I didn't take his money.**

A. After he asked me, and I give it to him, he took out money.

Q. What?

A. After I give him drink, he took out money. He says, 'Take it. Friend of mine gave me 50 cents. I don't want this for nothing. I know you don't get it for nothing yourself.' I says, 'No, I didn't pay for that.'

Q. They lied when they went on the stand and said that?

A. Yes. They are after me to sell moonshine, but I am not going to do it. They are after me, to make some money from me."

In view of the fact that the defendant, Bakotich,

denied that he had been entrapped into the commission of any crime, and claimed that he had given the liquor to the officer upon his solicitation, and made no claim that the officer had anything to do with his possession of the liquor, it would seem beyond any doubt that the instruction as given by the Trial Court covered the defendant's theory of the case. I refer to the instruction on page 39 of the transcript, which reads as follows:

> "Now, as to the sale, it seems that the immediate question as to whether a sale took place between the defendant and McGhee depends almost alone upon the testimony of McGhee and the defendant. They do not concur in what they say about it. The defendant says that he gave the liquor to McGhee. Of course, the Government, having alleged a sale, must prove a sale, and if the defendant gave the liquor to McGhee without a consideration, the count is not proven. But the question here, Gentlemen of the Jury, is for you to determine, as between these two men, which one is telling the truth. Is McGhee telling the truth when he says he paid 50 cents for this liquor; or is the defendant telling the

> truth when he says that he gave the liquor to McGhee? You may take into consideration all the circumstances surrounding the entire transaction—what was done and said there, and the probabilities of the fact, and determine for yourselves whether or not, beyond a reasonable doubt, the Government has established the fact, as alleged, that the defendant sold liquor, intoxicating liquor, or moonshine, to the plaintiff."

The Trial Court told the jury that if they believed the defendant's testimony concerning the giving of the liquor to McGhee, as he had contended, they should acquit him of the second count in the indictment. The Court stated that the "Government, having alleged a sale, must prove a sale, and if the defendant gave the liquor to McGhee without a consideration, the count is not proven." Such an instruction by the Court is more favorable to the defendant than the instruction requested by him, and is more applicable to the theory of the defendant's defense than the instruction of entrapment requested, and the failure to give said instructions cannot be said to be prejudicial to the defendant, in view of the instruction given by the Court on that point.

In any event, a reversal in this case as to Count

II, alleging the sale of intoxicating liquor, for error committed by the Trial Court would not affect the verdict of the jury as to Counts I and III charging the possession of intoxicating liquor and maintaining a common nuisance in violation of the National Prohibition Act, nor the judgment of the Court, in view of the fact that the sentence of nine months and $250 could have been imposed as a judgment upon a conviction on Counts I and III.

I quote from the decision of Judge Hunt in the case of Panzich vs. United States, supra, as follows:

> We find no merit in the second assignment, that, inasmuch as Mary Panzich was acquitted of the charge of an unlawful sale, the verdict of guilty of maintaining a common nuisance cannot stand against her. Acquittal of making a sale is not inconsistent with guilt of keeping a place where the purpose is to sell and barter. That no business is done is immaterial, if the place is kept for the purpose of doing business."

Respectfully submitted.

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